IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA,
Petitioner,

v.

ISTHMIAN STEAMSHIP COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner, *against* ISTHMIAN STEAMSHIP COMPANY, Respondent.	No. 285, October Term, 1958

BRIEF FOR RESPONDENT.

Certiorari was granted in this case (R. 26) to review an order of the United States Court of Appeals, Second Circuit, (R. 25) affirming a final decree of the United States District Court for the Southern District of New York, in admiralty, for $117,314.27 recovered by respondent against the United States (R. 21) upon an admitted claim for maritime freight (R. 3-5). The suit was brought pursuant to the Suits in Admiralty Act (46 U. S. C. 741-752). (R. 3).

The District Court held that the sole defense pleaded in the answer of the United States—i.e., an attempted set-off against the libelant of a disputed claim wholly unrelated to the subject matter of the libel—was not cognizable in admiralty. (R. 16-19)

QUESTION PRESENTED.

The brief for the United States fails to mention the single basic question presented for review.

Broadly stated, the basic question is whether the express requirement of the Suits in Admiralty Act, that suits brought pursuant thereto against the United States "shall proceed and shall be heard and determined accord-

ing to the principles of law and to the rules of practice obtaining in like cases between private parties", is subject to exceptions which do not appear in the terms of the Act.

The foregoing question was presented in two specific ways:

(1) The courts below held that the United States may not prevent a libelant from recovering a decree upon an admitted claim, by pleading a set-off of an unrelated claim which could not be maintained as a set-off under the rules of practice applicable in admiralty suits between private parties.

(2) In accordance with the law and practice obtaining in suits between private parties, the courts below awarded respondent interest (at the rate provided in the Act) upon the whole amount of the judgment debt stated in the final decree whereas the United States claimed that interest should not run upon that portion of the total recovery which represented: (a) interest on the principal amount of the debt from the filing of the libel to the date of the decree and (b) the costs of suit.

STATUTES INVOLVED.

1. The statute directly involved is the *Suits in Admiralty Act*, (Act of March 9, 1920, Ch. 95; 41 Stat. 525, 46 U. S. C. Secs. 741-752). As the brief for the United States omits the portion of Sec. 3 (46 U. S. C. Sec. 743) upon which the basic question in this case turns, the material portions are quoted below (emphasis ours):

> "**That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree** against the United States or such corporation **may include** costs of suit,

and **when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied,** or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. **Interest shall run as ordered by the court.** Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction * * *."

2. The brief for the United States cites (p. 13, n.) but fails to quote the statute which expressly prescribes the withholding or set-off procedure to be followed by the General Accounting Office in cases, such as the present one, where judgment is recovered against the United States by a judgment creditor who is alleged to be indebted to the United States in a separate transaction. Such procedure appears in 31 U. S. C. Section 227 (Act of March 3, 1875, 18 Stat. 481; Act of March 3, 1933, 47 Stat. 1516) which reads as follows (emphasis ours):

"When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judg-

ment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. *And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.*"

3. The pertinent general rules of admiralty practice prescribed by this Court for the district courts and the rules of the District Court below regarding set-offs in admiralty are quoted in the brief for the United States (pp. 3-5) but there is no citation or quotation of the statutory provisions which give those rules effect and preclude any exception or amendment to such rules being made merely for the purpose of this suit or otherwise than by the procedure specified by statute. The two statutory provisions in question are Sections 2071 and 2073 of Title 28, United States Code (as amended by the Act of May 24, 1949, c. 139, Sec. 104, 63 Stat. 104 and by Act of May 10, 1950, c. 174, Sec. 3, 64 Stat. 158), which read as follows:

"§2071. Rule-making power generally

"Each court established pursuant to Act of Congress may from time to time prescribe rules for the conduct of its business. Such rules shall be consistent with Acts of Congress and rules prescribed by the Supreme Court."

• • • • • •

"§2073. Admiralty rules for district courts

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way, limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Statement of the Case.

The statement of the case in the brief for the United States (pp. 5-9) omits certain material facts.

1. No reference is made to the article of the answer (Article 3) by which the government admitted its obligation to libelant [respondent in this court] for the freight which the libel was filed to recover. The freight was earned by transportation of military cargo shipped in 1953 by the Military Sea Transportation Service aboard respondent's *S.S. Steel Worker* (R. 5).

Elsewhere in the brief, however, there are repeated admissions[1] that the freight was admittedly owed, although such admissions are usually coupled with contentions that the freight had been "paid" by the act of the General Accounting Office in withholding payment because of a disputed claim of the Maritime Administration against respondent under an entirely different and unrelated contract which had terminated in 1948.

2. Other material facts which are omitted show the untenability of the government's contention "that the government's defense of withholding and applying is in the nature of a plea of payment" (p. 12).

(a) No statement appears of the grounds of the decision of the Court of Claims which dismissed, for lack of jurisdiction, the suit which respondent initially brought, through other counsel, in that Court to recover its freight.

The opinion of the Court of Claims (131 C. Cls. 472) expressly states that Isthmian's [respondent's] suit there was upon the common law counts of "money had and received by defendant for plaintiff's use or on an account stated" (131 C. Cls. at 473). It was held that neither count was maintainable because an implied promise to pay was an essential element of both counts whereas "instead of a promise, there has been a refusal to pay." The Court of Claims held, therefore, that Isthmian's claim was for freight money which "defendant refuses to pay" notwithstanding "that defendant admits liability" (131 C. Cls. at 473). Consequently, Isthmian's claim was held to be maritime and,

[1] The brief for the United States variously refers to respondent's freight claim as one which the government "admittedly owes" (p. 2) or as a "freight bill" the "correctness" of which is conceded (p. 9) or as an "admitted debt" (p. 10) or as "money which it [the government] admittedly owes" (pp. 11, 15) or as "the claimant's uncontested claim" (p. 16).

therefore, within the exclusive jurisdiction of the district courts in admiralty. *Johnson* v. *Fleet Corp.*, 280 U. S. 320.

Petitioner's brief erroneously implies (p. 6) that the Court of Claims "agreed" that the subject matter of the suit was "either Isthmian's claim for maritime freight or the Government's claim for additional charter hire." No reference to the government's claim for charter hire appears in the opinion of the Court of Claims.

(b) The brief for the United States admits (p. 7) that, before filing its answer in this case, the government had begun **a separate suit** in admiralty in the District Court against Isthmian [respondent] **for recovery of the identical $115,203.76 in additional charter hire** which it attempted to assert as a set-off in this suit (R. 10-12).

No mention is made, however, of the government's allegation in Article Ninth of its libel in that suit that "**although duly demanded, no part of said sum of $115,203.76 has been paid and there is now due and owing to libelant from the respondent the sum of $115,203.76** with interest thereon from July 1, 1948" (Emphasis ours).

No mention is made, either, of the fact that the independent suit is pending at issue in the District Court and, if tried, will determine the merits of the disputed claim which the government attempted to set-off in this suit. The case has been kept off the trial calendar by the government, however, pending the outcome of the present suit.

SUMMARY OF ARGUMENT.

I.

This case is governed by the requirement of Section 3 of the Suits in Admiralty Act (46 U. S. C. 743) that suits under the Act shall be determined "according to the principles of law and to the rules of practice obtaining in like cases between private parties".

As respondent's libel was brought under the authority of the Act, the United States was not entitled to assert any set-off or other defense which would not be permissible under the rules of practice applicable in suits between private parties.

Those rules precluded the United States from asserting a set-off based wholly on a claim of the United States against respondent unrelated to the contract or transaction upon which respondent's libel was based.

That rule of admiralty practice has uniformly obtained in all the maritime circuits and is recognized in the admiralty rules of practice promulgated by this Court and by the District Court.

Historically, the admiralty set-off rule approximates the common law rule prior to the enactment of the statutes extending the scope of set-offs in actions at law. Admiralty practice was never changed by statute or by general rule having statutory force as occurred in respect of suits in equity and subsequently under Rule 13 of the rules of civil practice.

Various sound reasons exist why the scope of admiralty set-offs should not be extended and are indicated at pages 15-16, *infra*. The merits or demerits of the admiralty rule are immaterial in this case, however, because the existing rule governs and may only be changed by an exercise of the statutory rule-making power of this Court, exercised in the manner provided in 28 U. S. C. 2073.

The second point of petitioner's brief (pp. 21-29) does not seriously challenge the existence of the admiralty rule against unrelated set-offs but consists, in effect, of a plea that the requirements of the Suits in Admiralty Act and of the admiralty rule should be disregarded and a special exception to the rule should be made for the purpose of government cases.

The decisions and authorities cited in the second point of petitioner's brief are, necessarily, immaterial because they relate only to the contention that the existing admiralty rule on set-offs should be changed.

II.

Respondent's second point shows that enforcement of the admiralty rule prohibiting unrelated set-offs, cannot prejudice the interests of the United States. In fact, Congress has specified in 31 U. S. C. 227, the procedure to be followed in cases where judgment is recovered against the United States by a judgment creditor who owes or is claimed to owe money to the United States.

III.

The attempt in point I of the petitioner's brief to avoid the admiralty set-off rule cannot be maintained because it depends on two fictitious contentions, that: (A) the petitioner's set-off was a plea of "payment"; or (B) the set-off was "the real subject matter of the suit".

A. Instead of alleging payment of respondent's claim, the government's attempted set-off showed that the government refused to pay respondent's claim because of the government's disputed claim against respondent. The withholding of payment did not and could not constitutionally discharge or satisfy the debt of the United States to the respondent and, therefore, could not constitute a payment.

The rights of the parties remain exactly as they were before the withholding occurred.

The decisions cited in the brief for the United States are not in point.

B. The contention of the United States that the set-off was "the real subject matter" of the litigation is palpably wrong because it assumes the conclusion which it purports to establish. It assumes that the set-off constituted an "affirmative defense" which presented issues to be decided in this litigation. In fact, however, the set-off of an unrelated claim was improper under admiralty practice and, therefore, could not constitute an affirmative defense or raise any issues in the case.

Other reasons why the contention is unfounded are set forth on pages 30-32, *infra*.

None of the cases cited in petitioner's brief (pp. 15-21) support its contention on this point.

IV.

The government's objection to the decree as an allowance of "compound interest" is unfounded. The interest allowed was expressly authorized by Section 3 of the Suits in Admiralty Act and was in accordance with the practice obtaining in suits in admiralty between private parties. Moreover, the decree only allowed simple interest and not compound interest as petitioner claims.

A similar decree against the United States under the Suits in Admiralty Act was expressly upheld in *National Bulk Carriers, Inc.* v. *United States*, 169 F. (2d) 943, 951.

ARGUMENT.

FIRST POINT.

PETITIONER'S ATTEMPTED SET-OFF OF A CLAIM UNRELATED TO THE SUBJECT MATTER OF THE LIBEL, WAS IMPROPER BECAUSE THE SUITS IN ADMIRALTY ACT REQUIRES OBSERVANCE OF THE ADMIRALTY RULE FORBIDDING SUCH SET-OFFS.

Somewhat disingenuously, the brief for the United States does not even mention the express requirement of the first sentence of Section 3 of the Suits in Admiralty Act, (quoted *supra*, p. 2), that suits under the Act shall proceed and be determined **"according to the principles of law and to the rules of practice obtaining in like cases between private parties"**.

Disregarding that requirement of the Act, the petitioner's brief asks this Court, in effect, to exempt the United States from the established admiralty rule which forbids set-offs of claims unrelated to the subject matter of the libel. The two alternative and untenable grounds upon which petitioner's request is based will be discussed in the Third Point of this brief.

Under its first point of argument, respondent will show that the rule of practice against unrelated set-offs has existed in the admiralty courts of the United States from the outset and that there are sound reasons for it. Respondent will further show that the rule has the force of law and is applicable to private parties and the government alike and may not be changed except in the manner provided by statute.

The first reported statement of the admiralty rule against unrelated set-offs appears to be by Story, C. J., in *Willard* v. *Dorr*, 1823, C. C., Mass., 3 Mason 161; 29 Fed.

Cas. No. 17,680. That was a suit in admiralty against a shipowner for the wages of a shipmaster upon a voyage from Boston to China during which the vessel was captured and sold as prize. The shipowner's answer pleaded certain set-offs. Some of the set-offs were for partial payments of wages and were allowed. Other set-offs were claimed, however, for "debts and claims of a wholly independent nature" and those were disallowed. Judge Story's remarks on the subject were as follows (29 Fed. Cas. p. 1280):

> "* * * Now in respect to the latter, [debts and claims of a wholly independent nature] I am utterly at a loss to know, how they can be properly brought within the cognizance of this court. Most of them are not of a maritime nature; and even if they were, as they do not grow out of the maritime contract, on which the libel is framed, it is difficult to perceive, how they are founded in point of jurisdiction. Courts of admiralty are not invested by statute with any authority to hold plea of set-offs generally. Wherever they do entertain such claims, it is upon general principles of equity, where the claims attach to the particular maritime demand, submitted to their cognizance by the libel, and not upon any notion of a right to enforce such set-offs, as are now recognized and enforced in courts of common law under statuteable provisions. The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as restitution in value for damages sustained in consequence of gross violations of the contract for such services. The duty of the court is clear, therefore, and it ought not to entertain any jurisdiction over such set-offs."

The rule recognized by Judge Story in *Willard* v. *Dorr*, *supra*, has been applied uniformly in all the circuits in which admiralty cases are most frequently heard. A collection of thirty-one reported decisions applying the rule appears in the margin.[2] We have marked with an asterisk the decisions in the foregoing collection where the admiralty courts declined to permit a respondent to set-off a claim arising under a different contract from the one upon which the libel was based.

Further recognition of the admiralty rule against set-offs of unrelated claims appears in the various Court rules which are quoted at pages 3-5 of the brief for the United States.

Rule 50 of the Rules of Practice promulgated by this Court on December 6, 1920 (245 U. S., appendix), for "the

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[2] First Circuit: **Willard* v. *Dorr*, 1823, C. C. Mass. (Story, J.), 3 Mason 161, 29 Fed. Cas. No. 17680; *Dexter* v. *Munroe*, 1861, 2 Spr. 39; 7 Fed. Cas. No. 3863; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency*, 1902, 116 F. 857; *Howard* v. *9889 Bags of Malt*, 1919, 255 F. 917.

Second Circuit: *The Hudson*, 1846, Olc. 396, 12 Fed. Cas. No. 6831; **Emery* v. *Tweedie Trading Co.*, 1905, 143 F. 144; **The Oceano*, 1906, 148 F. 131; **Roney* v. *Chase, Talbott & Co.*, 1907, 160 F. 268 (rev. on other grounds, 161 F. 309); *McCaldin Bros.* v. *Donald S. S. Co.*, 1907, 169 F. 992; **United Trans. Co.* v. *N. Y. & Baltimore S. S. Co.*, 1910, 180 F. 902, aff. 185 F. 386; **The Jane Palmer*, 1920, 270 F. 609; *Castner, Curran & Bullitt, Inc.* v. *United States*, 1925, C. C. A. 2, 5 F. (2d) 214; **The Yankee*, 1941 37 F. Supp. 512; *Cioffi* v. *New Zealand Shipping Co.*, 1947, 73 F. Supp. 1015; *Ozanic* v. *United States*, 1951, C. C. A. 2, 188 F. (2d) 228.

Third Circuit: *Bains* v. *The James and Catherine*, 1832, Baldw. 544, 2 Fed. Cas. No. 756; *Crowell* v. *The Theresa Wolf*, 1880, 4 F. 152; **The Zouave*, 1886, 29 F. 296; *The Frank Gilmore*, 1896, 73 F. 686; *The Leader*, 1910, 181 F. 743, 746 (rev. on other grounds, 187 F. 807); **Rogers Sand Co.* v. *Monongahela & Ohio Dredging Co.*, 1924, C. C. A. 3, 296 F. 919; *The Kearney*, 1926, C. C. A. 3, 14 F. (2d) 949.

Fourth Circuit: *O'Brien* v. *1614 Bags of Guano*, 1882, 48 F. 726; **Susquehanna S. S. Co.* v. *Anderson*, 1925, C. C. A. 4, 6 F. (2d) 858.

Courts of the United States in Admiralty and Maritime Jurisdiction", deals with the furnishing of security for a counterclaim **"arising out of the same contract or cause of action for which the original libel was filed."**

Rule 16 of the Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York provides that the answer of a respondent or claimant may ask recoupment or set-off of damages **"growing out of the transactions referred to in the libel."** Rule 17 of the same district courts gives respondents and claimants a like privilege to assert against a co-party, a claim **"arising out of the transaction, occurrence or property that is the subject matter of the original cause."**

Contrary to the suggestion in petitioner's brief (p. 23), the foregoing decisions and court rules do not represent a "narrowing" of the scope of set-off and counterclaim in admiralty.

Historically, the right of a defendant to set off independent claims against the plaintiff was the creature of statute. *Stoqk* v. *Taylor* (1880), 5 Q. B. D. 569, 575. Until 2 Geo. II c. 22, Sec. 13 and 8 Geo. II c. 24, Sec. 4 were enacted in 1728 and 1734, respectively, the common law did not permit such set-offs. *United States* v. *Eckford*, 6 Wall.

FIFTH CIRCUIT: *Southwestern Trans. Co.* v. *Pittsburgh Coal Co.*, 1890, 42 F. 920; **Hildebrand* v. *Geneva Mill Co.*, 1929, 32 F. (2d) 343; **Koch, Ellis Co.* v. *Phillips Petroleum Co.*, 1955, 219 F. (2d) 520.

SIXTH CIRCUIT: **The Two Brothers*, 1880, 4 F. 158; *The Donald T. Wright*, 1939, 30 F. Supp. 610.

NINTH CIRCUIT: *The Ping On.* v. *Blethen*, 1882, 11 F. 607; **Anderson* v. *Pacific Coast Co.*, 1900, 99 F. 109.

See also: *Armour & Co.* v. *Ft. Morgan S. S. Co.*, 1926, 270 U. S. 253 at 259 (note).

* Indicates decisions, like those of the lower courts in this case, denying set-offs arising out of a contract other than the contract upon which the libel was based.

484 at 488. Theretofore, the defendant could only exercise a right of recoupment by which he could reduce or off-set plaintiff's demand by asserting damages arising out of the transaction constituting the plaintiff's demand. 80 Corpus Juris Secundum 5.

Suits in equity and in admiralty remained unaffected, however, by the statutes just cited and their counterparts in the American colonies which only applied to actions at law.

Equitable relief equivalent to a set-off, of course, remained available to prevent injustice in certain classes of cases, as where the plaintiff in an action of law was insolvent or where plaintiff's claims were incurred upon a mutual credit. (Per L. Hand, J., in *Susquehanna* v. *Anderson,* 1921 S. D. N. Y. 275 Fed. 355.)

In admiralty, however, the right of set-off remained approximately the same as the right of recoupment had been at common law. There were and are good and obvious reasons why admiralty set-offs should not extend further.

In the first place, admiralty jurisdiction of subject matter is restricted. Unlike courts exercising jurisdiction at law, admiralty courts cannot determine all disputes which may exist between the parties to a given suit and thereby avoid circuity of action which is the basic reason for permitting set-offs in actions at law.

Secondly, as the government's brief recognizes (pp. 23-25), an extension of the right of set-off may adversely affect seamen's rights or the adversary's right to a trial by jury.

Thirdly, unrelated set-offs would undoubtedly complicate and impair exercise of the vital right of admiralty suitors to obtain security by a libel *in rem* or by process of foreign attachment. Under existing admiralty practice, a respondent or claimant in such a case may obtain security

upon a cross-claim arising out of the same contract or cause of action as provided in Admiralty Rule 50 of the rules of practice promulgated by this Court. (Petitioner's Brief, pp. 3-4.) If set-offs and cross-libels unlimited as to subject matter were permitted, however, the right to security on such claims might easily become a means of greatly impairing the effectiveness of traditional admiralty right of libelants to obtain security by suits *in rem* or by foreign attachment in suits *in personam*.

Fourthly, admiralty proceedings commonly involve the rights of underwriters and others in addition to the parties in whose names the suits are brought and defended. (*United States* v. *Atlantic Mutual Ins. Co.*, 1952, 343 U. S. 236). It is easy to see that such rights might be adversely affected if a multiplicity of extraneous issues could be brought in and the transaction upon which the libel was founded should be lost to view.

Fifthly, the United States itself has recognized the need of restricted set-offs in admiralty by providing in the Public Vessels Act (46 U. S. C. 783) that a private person sued by the United States in admiralty may only "claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action * * *."

In any event, it is not open to government counsel in this case to argue about the soundness of the admiralty rule as applied to the facts of this particular litigation. The rule exists and has the force of law. (28 U. S. C. Sec. 2071, quoted *supra*, p. 4; *Hicks* v. *Bekins*, 1940, 115 F. (2d) 406.)

Debate as to the merits of the existing rule is useless, because modification of the rule could only be accomplished by a new general rule of admiralty practice promulgated by this Court to become effective not earlier than 90 days

after having been reported to Congress by the Chief Justice as provided in Section 2073 of Title 28, United States Code (quoted *supra* at p. 5).

Meanwhile, the Suits in Admiralty Act unquestionably requires that the present rule of practice prohibiting set-off of claims unrelated to the transaction in the libel, shall be binding upon the United States in suits brought under the Act.

The considerations above stated make unnecessary any detailed reply to the Second Point of the brief for the United States (pp. 21-29) in which the petitioner argues that the "jurisdiction" of the admiralty courts over set-offs in government suits should not be limited to those arising from the same transaction.

A special rule applicable to government cases is not permissible because, as we have shown, the Suits in Admiralty Act requires observance of the rules of practice which obtain in suits between private parties, including the rule against unrelated set-offs.

Petitioner's argument is also untenable because it fails to recognize that statutory authorization would be necessary to enlarge the set-offs cognizable in admiralty suits and no such authorization exists for changing the rules by a decision in this or any other litigated case.

Furthermore, petitioner's argument would have no merit even if the advisability of revision of the existing admiralty rules of practice were one of the questions presented for review in this case.

The substance of petitioner's argument is that the reasons which justify the rule against unrelated set-offs in other cases have no applicability to the facts of the present case, because it does not involve rights of seamen or any complexity of issues or parties or any right to jury trial or any non-maritime set-offs.

It is unthinkable, however, that the enforcement or application of a statute or rule having statutory force should be optional or discretionary in each case, depending on whether the case presents any of the circumstances which caused the statute or rule to be adopted. Moreover, the petitioner's brief fails to state all the reasons which support the admiralty set-off rule.

Two other reasons are given in petitioner's brief (pp. 25-6) for disregarding the rule. One is that admiralty should follow the equity rule regarding set-offs which was established in 1912 (226 U. S. 657, Rule 30) and has since been merged into Rule 13 of the Federal Rules of Civil Procedure. The analogy to equity is improper because of the differences in jurisdiction between admiralty and equity. The argument is untenable, in any event, because both the equity Rule 30 and Rule 13 of the Federal Rules of Civil Procedure were adopted under the authority of general statutory enactments.

The case of *British Transport Commission* v. *United States*, 1957, 354 U. S. 129, is cited by petitioner as an authority for following equity practice as to set-offs in admiralty suits. In fact, however, the cross-claim allowed to be asserted in that case was for damage resulting from "the identical incident" which was the subject matter of the limitation of liability proceeding in the district court.

Similar circumstances make inapplicable petitioner's next suggestion that admiralty should have the same jurisdiction over set-offs as do the Court of Claims and the District Courts under Sections 1346 (c) and 1503 of Title 28, United States Code. Those sections are not applicable to admiralty suits. On the contrary, they are illustrations of the need of express statutory authority for set-offs and counter-claims unrelated to the contract or transaction upon which the action is brought.

Petitioner's further suggestion in the footnote (p. 26, n. 16) that set-offs in admiralty are justified by Section 71 of Title 31, United States Code is plainly untenable. That Section merely relates to the power of the General Accounting Office to settle and adjust claims. It does not in any way affect or purport to affect the practice in any of the courts of the United States. In *McKnight* v. *United States*, 13 C. Cl., 292, 307, the Court referred to the decisions of the Comptroller as "conclusive upon the executive branch of the government, **but not upon Congress or the courts**". (Emphasis ours.)

Petitioner's final point (Brief, pp. 27-29) that set-offs of unrelated claims are not expressly prohibited by certain written rules of practice is beside the point. The point is that such set-offs cannot be made in admiralty because they lack statutory authorization and that fact has been repeatedly recognized by the admiralty courts. Therefore, it is unnecessary that the written rules of the court should expressly exclude such set-offs. In fact, however, Rule 16 of the District Court is irreconcilable with the petitioner's claim that unrelated set-offs may be pleaded in admiralty. (See petitioner's brief, p. 28.)

Finally, there is also one cogent reason why this Court would not be justified in laying down any new rule even if it were free to do so in this case. That reason was recognized and stated in the recent decision in *Hawkins* v. *United States*, 358 U. S. 74. In footnote No. 4, at p. 82, Mr. Justice Stewart said, in his concurring opinion:

> "It is obvious, however, that all the data necessary for an intelligent formulation [of a new rule] 'in the light of reason and experience' could never be provided in a single litigated case."

SECOND POINT.

ENFORCEMENT OF THE ADMIRALTY RULE PROHIBITING SET-OFFS OF UNRELATED CLAIMS DOES NOT PREJUDICE THE INTERESTS OF THE UNITED STATES IN ANY RESPECT OR CONFLICT WITH THE STATUTORY AUTHORITY OF THE GENERAL ACCOUNTING OFFICE TO SETTLE AND ADJUST CLAIMS BY OR AGAINST THE UNITED STATES.

In 31 U. S. C. Sec. 227 (quoted at p. 3, *supra*) Congress has specified the withholding or set-off procedure to be followed by the General Accounting Office in cases where judgment is recovered against the United States and the judgment creditor owes or is claimed to owe money to the United States.

In such cases, if the judgment creditor denies his indebtedness, the statute requires the United States to prosecute suit against the judgment creditor to establish the disputed claim. If the United States fails to establish its claim or fails to establish it in full, the judgment creditor is entitled to the amount wrongfully withheld together with interest thereon.

This procedure fully protects the United States and, at the same time, gives the judgment creditor some measure of redress, by way of interest, when the government's set-off proves to be unfounded.

In the instant case, the United States has already instituted a separate suit in admiralty on its disputed claim (see p. 7, *supra*). Therefore, in order to protect the United States fully, the General Accounting Office needs only to follow the other steps specified in 31 U. S. C. Sec. 227.

No reason appears why the United States would suffer any prejudice or disadvantage whatever by prosecuting its

disputed claim in the pending separate suit rather than as a set-off to respondent's undisputed claim. In either event, the merits of the government's claim would be determined in the same court upon the same allegations and the same evidence.

Petitioner's contention that such a set-off is a necessary incident of so-called "administrative recoupment" pursuant to 31 U. S. C. Sec. 71, will not bear analysis as the next point of argument shows.

THIRD POINT.

THE GOVERNMENT'S SET-OFF WAS NOT COGNIZABLE EITHER AS A PLEA OF "PAYMENT" OR AS BEING "THE REAL SUBJECT MATTER OF THE SUIT".

Attempting to circumvent application of the admiralty set-off rule, the first point of petitioner's argument (brief, pp. 12-21) claims that the disputed claim for charter hire alleged in the government's answer was not really a set-off but was either: (A) a plea of "payment" of the undisputed and unrelated freight claim alleged in respondent's libel; or (B) "the real subject matter of the litigation."

Both those contentions are palpable fictions, as we show below.

A. The refusal of the General Accounting Office to pay respondent's admitted freight claim because of the government's unrelated and disputed claim against respondent cannot possibly constitute payment of respondent's claim. Both the District Court and the Court of Appeals so held. (R. 18; Appendix to petitioner's brief, p. 37-40.) An identical holding was also made by the Court of Claims when respondent's claim was before that Court (*supra*, p. 6).

Payment of a debt effects the discharge or satisfaction of the debt. *Restatement, Contracts,* Sec. 386. It is manifest, however, that the debt of the United States to respondent was not discharged or satisfied by the act of the General Accounting Office which the government's brief describes (pp. 2 and 12) as "administrative recoupment" pursuant to 31 U. S. C. 71.

The authority given to the General Accounting Office by that statute is simply to settle and adjust claims by or against the United States. That identical authority had been vested in the accounting officers of Treasury from 1817 up to the establishment of the General Accounting Office in 1921 (3 Stat. 366).

Neither that statute nor any other purports to or could constitutionally give the General Accounting Office the right to discharge or satisfy a debt of the United States, without the consent of the creditor, merely by asserting a claim of equal amount by the United States against the creditor.

Admission of the untenability of the contention of payment appears not only in the government's express allegation of non-payment in its separate libel (quoted *supra,* p. 7) but also in petitioner's brief (p. 14). Petitioner says: "To be sure, the debt owed by the Government is not discharged by the mere *ipse dixit* of the Comptroller General that the claimant, himself, is indebted to the United States."

Obviously, if the government's debt to respondent was admittedly not discharged by the *ex parte* act of the Comptroller in withholding payment because of the government's cross-claim, then respondent's cause of action remained unimpaired. *McKnight* v. *United States,* 13 C. Cls. 292, 306. Therefore, the Comptroller's act could not support a defense on the ground of payment or on any other ground. A cross-claim is not a defense but a separate demand.

Merchants Heat etc. Co. v. *Clow & Sons*, 1907, 204 U. S. 286, 289; *Virginia-Carolina Chemical Co.* v. *Kirven*, 1909, 215 U. S. 252 at pp. 257-8.

No greater legal significance is given to the Comptroller's acts by 31 U. S. C. 71, either expressly or impliedly, than to the similar act of any private debtor in withholding payment of his debt because of his own claim against the creditor.

Mutual debts, even if liquidated and admitted, do not extinguish one another "either automatically or by manifestation of election of one party. Either agreement of the parties or judicial action is necessary". *Williston on Contracts*, Rev. Ed., Vol. III, Sec. 887 E. As Williston points out, lapse of time may bar recovery on one of the cross debts and leave the other still enforceable. Such lapse of time had, in fact, barred the cross-claim which the General Accounting Office had tried to set-off against the government's admitted debt in the case of *Grace Line* v. *United States*,[3] 225 F. (2d) 810.

For the foregoing reasons, the Courts below were clearly right in holding that the petitioner's attempted set-off of its unrelated and disputed claim against respondent was not cognizable as a plea of payment of the debt admittedly owing from the United States to respondent.

In the District Court, Judge Dimock said (R. 18):

> "The government either paid the freight to Isthmian or it did not. If it paid the freight it did so by cancelling its claim against Isthmian for charter hire. Suit for the charter hire is completely inconsistent with any such cancellation. See *Climactic*

[3] The Court of Appeals, Second Circuit in the instant case expressly adopted (R. 24) the reasoning in its opinion in the *Grace Line* case which was argued at the same time and reported at 225 F. (2d) 810 and is also printed as an appendix to petitioner's brief.

Rainwear Co. v. *United States*, Ct. Cl., 88 F. Supp. 415."

The Court of Appeals said:

> "* * * it is abundantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States" (Petitioner's brief, p. 40).

None of the decisions cited by petitioner on this point (Brief, pp. 13-15) are inconsistent with the foregoing propositions. On the contrary, *McKnight* v. *United States*, 13 C. Cls. 292, supports respondent's argument.

The *McKnight* case involved a suit brought in 1877 to recover a balance of $9,000 claimed to be due to plaintiffs' assignor under a certificate of indebtedness of $30,675 for flour delivered to the army in 1861. The certificate had been issued by the accounting officers of the Treasury in January 1873. The balance of $9,000 represented a sum withheld from the amount certified because of an indebtedness of the plaintiff's assignor upon a surety bond given by him to the United States.

The Court of Claims made no decision whatever upon the merits of the withholding of $9,000 but merely held that the certificate upon which the plaintiffs sued was "not *prima facie* evidence to charge the United States". Parenthetically, attention is invited to the fact that the *McKnight* decision demonstrates the error of petitioner's contention (brief, pp. 15-21) that a government set-off against an admitted debt makes the set-off, rather than the debt, "the real subject matter" of a suit brought upon the debt.

Richardson, J. speaking in regard to the effect of certificate of the accounting officers of the Treasury said (p. 306):

> "The certificates and orders made previously to the issuing of the drafts are departmental proceed-

> ings, directions among the several public officers, none of which are delivered to the claimants, or even allowed to be seen and examined by them, without leave from some officer having authority to grant it. Parties gain no new rights thereby, into which their former rights of action are merged, and upon which actions can and must be brought as upon an award. There is nothing in the proceedings in the nature of a submission to arbitration."

He further said, (p. 312):

> "* * * accounts and balances stated by those officers, involving controverted questions of law as well as of fact, depending upon the genuineness, validity, and legal effect of documents, as the assignment of the voucher in this case, which are not matters of public record nor within the knowledge of officers of the department in which they are filed, and are accepted upon evidence which would not be admitted in any court of justice, are not *prima-facie* evidence to charge the United States in suits against the Government."

Plaintiffs' case failed, therefore, because they had failed to establish the validity of the claim from which the deduction had been made. No question was presented as to the legal effect flowing from the act of the accounting officers in setting-off the cross-claim of $9,000.

It necessarily follows from *McKnight's* case, however, that if the certificate of the accounting officers had no legal effect to establish a claim *against* the United States, the acts of those very same officers also lacked any legal force to establish the cross-claim of the United States against the plaintiff's assignor.

Taggart v. *United States*, 17 C. Cls. 322, likewise did not involve any holding on the legal effect of set-offs by government accounting officers. The suit was upon a claim against

the United States for failure of the accounting officers of the Treasury to collect the full amount of a judgment for $1,854 which had been recovered by the plaintiff, Taggart, against a private individual named White and had been assigned by Taggart to the United States as collateral security for a balance of indebtedness amounting to $1,119 due from Taggart to the United States.

The accounting officers collected the latter amount from the judgment debtor, White, by withholding it from a debt of $2,000 owed by the United States to White. The Court of Claims merely held that the accounting officers of the Treasury were not required or authorized to withhold from White any more than the amount of the government's claim against Taggart for which the judgment was merely collateral security. Hence, the Court held that the United States was not liable for the uncollected portion of the judgment.

Schooner Henry vs. *The United States*, 35 C. Cls. 393, was a decision even more remote from the point because the Court of Claims refused even to entertain a cross-claim of the United States in a special proceeding under an appropriation act providing for payment of French spoliation claims. The Court pointed out, 35 C. Cls. 395 that the Act of Mar. 3, 1875 (now 31 U. S. 227, quoted at pp. 3-4, *supra*) gave the Treasury "adequate power to guard the United States against the payment of judgments or claims when there exists in the Department a demand against the claimant which is the proper subject of set-off.

"We decide nothing affecting the rights of the parties as they may exist in the Treasury Department * * *."

United States v. *Munsey Trust Co.*, 1947, 332 U. S. 234, which is also cited repeatedly in petitioner's brief, is not pertinent to any issue here. The case involved the disposition of $12,445, representing percentages of progress payments retained by the United States under contracts for

repairing and painting certain public buildings. The contracts had been completed but a surety of the contractor had been required to pay for certain labor and material furnished under certain of the contracts. The United States also had an undisputed claim of $6,731 for damages sustained as a result of the contractor's failure to perform a contract independent of the other group of contracts.

The District Court in the District of Columbia appointed a receiver to collect the amounts due from the United States to the contractor. The General Accounting Office deducted the government's claim of $6,731 for damages and paid the receiver the balance of $5,714.00. The receiver then brought suit in the Court of Claims for the balance which had been withheld by the General Accounting Office. The Supreme Court reversed the decision of the Court of Claims and held that the government's deduction of its independent claim was a proper set-off.

The controversy before the Court did not present any dispute as to the Court's jurisdiction of the government's set-off. Jurisdiction is expressly conferred upon the Court of Claims by Section 145 of the Judicial Code (now Section 1503 of Title 28, U. S. C.) over *all set-offs* or demands by the United States against plaintiffs in the Court of Claims.

Furthermore, as the claim of the United States was undisputed, the case did not involve any question whether the withholding constituted "payment". The only contest was whether the cross-claim of the United States should be postponed or should yield priority to the claim of the surety. The Court held that the surety had no rights superior to the rights of the United States to set off the amount of its claim for damages.

Five other cases are cited by petitioner for a proposition which would be irrelevant here, even if correct. The proposition is stated thus (Brief, p. 14):

"• • • when the United States withholds payment on a debt owed by it and applies it to a valid claim of its own, the indebtedness of the claimant to the United States is discharged, and, conversely, the substance of his claim against the United States is destroyed. *McKnight* v. *United States*, 98 U. S. 179; *United States* v. *American Surety Co.*, 158 F. 2d 12, 13 (C. A. 5); *Sanders* v. *Commissioner of Internal Revenue*, 225 F. 2d 629, 637 (C. A. 10), certiorari denied, 350 U. S. 967; *American Railway Express Co.* v. *United States*, 62 C. Cls. 615, 636, certiorari denied, 273 U. S. 750; *Morgan* v. *United States*, 131 F. Supp. 783 (S. D. N. Y.)."

The proposition stated is irrelevant for two reasons. In the present case, the United States is asserting a disputed claim and not a "valid claim", in the sense of its being an admitted or indisputable claim.

Secondly, the United States does not concede that its claim against respondent has been discharged. On the contrary, it has a separate suit pending upon its claim (*supra*, p. 7) and in that suit it alleges that no part of its claim has been paid and it is "now due and owing" to the United States from the respondent.

In any event, none of the five cases cited stand for the proposition stated by petitioner. The *McKnight* case was an affirmance of the Court of Claims decision already stated, *supra*, p. 24.

American Railway Express (62 C. Cls. 615) involved, in part, the validity of a provision in the express company's form of receipt to the effect that claims in respect of shipments should be made within four months and suits for loss, damage or delay instituted within ten days.

The United States did not file formal claim or bring suit but instead withheld payment of charges due from the government to the express company for carrying subsequent

shipments. The Court held that such action "subserved" the purpose of the requirement of written notice of claim.

Morgan v. *United States*, 131 F. Supp. 783 was a case where judgment was recovered against the United States and a tax claim was set-off against a judgment creditor as provided in 31 U. S. C. Section 227 (*supra*, pp. 3-4). It was held that the set-off took precedence over an attorney's lien asserted against the attachment by counsel for the judgment creditor.

Neither of the other two cases, *United States* v. *American Surety Company*, 158 F. (2d) 12, and *Sanders* v. *Commissioner*, 225 F. (2d) 629, involved any dispute as to the propriety of the withholding. They merely held that if the government has recouped all or part of its claim against the debtor by withholding, it must allow credit for the amounts so withheld and cannot recover twice for the same amount.

In conclusion on this point, it is fitting to quote the statement of Mr. Justice Swayne in *McKnight* v. *United States*, 98 U. S. 179 at 186:

> "With few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter."

It is clear that if a private person had withheld payment of an independent claim against respondent as a set-off against a claim of respondent, such withholding would not constitute a defense in admiralty to respondent's claim. It would not be cognizable either as a set-off or on the fictitious theory that respondent's claim had been "paid" by the withholding. No reason has been shown by petitioner why the United States should stand in a better position than a private party. On the contrary, Congress

has expressly provided in the Suits in Admiralty Act that United States should be governed by the same rules which apply to private parties.

B. No extended argument is necessary to show the untenability of the petitioner's alternative contention (pp. 15-21) that "the real subject matter of this litigation" is "the validity of the Government's contested claim, not the libelant's uncontested claim."

Petitioner asserts that its admission of respondent's claim left petitioner's "affirmative defense" as the only issue in the case (Brief, p. 15), but its contention is plainly invalid for several reasons.

In the first place, the contention assumes the very point it pretends to establish. It assumes that the government's disputed claim for charter hire constituted "an affirmative defense", and, therefore, presented issues to be decided in this litigation.

Nothing could be plainer, however, than the fact that that the petitioner's attempted set-off of its disputed and unrelated claim for charter hire was not cognizable in this admiralty suit, as the first point of this brief shows. Being excluded from the case, petitioner's claim against respondent could not possibly raise issues in the case either by way of an affirmative defense or otherwise.

Secondly, petitioner's contention involves a manifest absurdity. In effect, the contention amounts to saying that respondent's suit is not upon its affirmative claim for freight but, rather, is to establish the invalidity of the government's claim against respondent. Thus, petitioner would treat a defense as a cause of action.

In fact, respondent's only cause of action against petitioner was its claim for freight (now merged in the decree of the District Court). Respondent could not possibly have

a cause of action upon petitioner's claim *against* respondent for charter hire, though respondent may have a good defense to that claim. Hence, it is absurd to suggest that "the real subject matter" of respondent's suit against the United States is the claim of the United States against the respondent.

One simple test of the fallacy of petitioner's contention is provided by Sec. 5 of the Suits in Admiralty Act (46 U. S. C. 745) which fixes a limit of two years "after the cause of action arises" upon the bringing of suits of the United States under the Act. Respondent's claim for freight arose when it carried and delivered petitioner's goods in April, 1953. The petitioner's withholding did not occur, however, until June 3, 1953 (R. 8).

If respondent had waited until June 3, 1955, to file its libel for freight, the United States would undoubtedly have pleaded the two-year limitation as a bar to respondent's claim. In fact, although respondent's suit was brought on March 29, 1955 (R. 2, 3), the government contended (unsuccessfully) in the Court of Appeals that respondent's claim was time barred because the libel failed to allege facts showing that it had been filed within two years after the cause of action arose.

In the third place, if the petitioner is correct in its contention that the Comptroller's withholding in this case was authorized by 31 U. S. C. 71 (Brief, p. 13), respondent could have no cause of action against the United States or the Comptroller General for the act of withholding. On petitioner's theory, the Comptroller's act was an exercise of his lawful administrative powers. It would not constitute either a tort or a breach of contract upon which a cause of action would arise in respondent's favor and be enforceable under the Suits in Admiralty Act or under any other

existing statutory authority permitting suits against the United States.

Nor is there any special statute providing for judicial review of withholdings by the Comptroller General in the admiralty courts or in any other court of the United States.

Fourthly, the decision of the Court of Claims (131 C. Cls. 472) precludes the United States from making the contention that its disputed claim against respondent is the real subject matter of this suit. As we have shown, (*supra*, p. 6), respondent's claim was presented in the Court of Claims, as an action for money had and received or, alternatively, upon an account stated. The Court of Claims expressly held, however, that respondent's sole cause of action was its claim against the United States for freight and that such claim was cognizable only in the District Court under the Suits in Admiralty Act.

None of the decisions cited by petitioner relates to admiralty practice and none of them is otherwise in point. *United States* v. *New Haven, etc. Ry. Co.*, 1957, 355 U. S. 253 was a suit under the Tucker Act which expressly permits the United States to make "any set-off" (28 U. S. C. 1346(c)). Furthermore the decision related only to the question whether the plaintiff carrier or the United States had the burden of proving a set-off made by the United States under the special conditions provided in Sec. 322 of the Transportation Act, 1940 (54 Stat. 955, 49 U. S. C. 66). That statute required the United States to pay certain common carrier freight bills "upon presentation" and "prior to audit" but reserved to the United States the right to deduct any overpayments "from any amount subsequently found to be due such carrier." The decision was that the burden of proof remained upon the carrier to establish its right to the freight charged to and paid by the United States but later deducted from other sums

due the carrier (in accordance with Sec. 322), as having been an overpayment.

In that case, the special statutory provision of the Transportation Act was held to put the United States in substantially the same position as if it had never paid the freight charge which it claimed to be excessive (355 U. S. 261). In such a situation, the railroad plaintiff would, of course, have had to sue upon and establish its claim.

The lack of analogy to the present case is evident. For one thing, the Suits in Admiralty Act and admiralty practice control this case exclusively. Section 322 of the Transportation Act, 1940, is inapplicable. Secondly, the effect of the government's deduction in the *New Haven* case was to require the carrier to establish its affirmative right to the freight charge which the government disputed by its deduction. The government set-off here did not challenge respondent's affirmative claim in any way, but was entirely distinct from it.

Alcoa S. S. Co. v. *United States*, 1949, 338 U. S. 421, was not a suit in admiralty but a suit at law under the Tucker Act (now 28 U. S. C. 1346). The United States set-off a claim for an erroneous payment of freight against plaintiff's claims for admitted debts from which the amount of the erroneous payment had been deducted. In suits under the Tucker Act, the United States has express statutory authority to claim "any set-off, counter-claim, or other demand whatsoever on the part of the United States against any plaintiff commencing an action under this section" (28 U. S. C. 1346(c)). The decision has no bearing whatever on set-offs in suits brought against the United States under the Suits in Admiralty Act.

Nor does *Wabash Ry. Co.* vs. *United States*, 1924, 59 C. Cls. 322 (aff. 270 U. S. 1), present any analogy. The United States had paid certain freight charges but later disputed

portions of the charges and deducted what it had paid on such portions, from other undisputed obligations of the United States to the carrier. The carrier's suit to recover the sums deducted was held to be timely although brought more than six years after the original services had been rendered but less than six years after the deductions were made. As the plaintiff's bills in that case had been paid, the Court was clearly right in holding that the plaintiff had no cause of action until the deductions were made. The holding of the Court of Claims on that point was not even discussed in the Supreme Court's opinion.

In any event, the decision in no way supports petitioner's contention that its claim against respondent rather than respondent's claim against petitioner was the subject matter of respondent's suit.

We conclude on this point by quoting what the Court of Appeals said in two other cases which were argued and decided along with the instant case. In denying petitioner's identical contention in the companion *Grace Line* case (Brief, p. 42; 255 F. (2d) 815) the Court said:

> "No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government but rather an attempt to interpose a set-off which is barred by established admiralty procedure."

Commenting further on the government's tactics, the Court of Appeals said in *Isbrandtsen Co.* v. *United States*, 255 F. (2d) 817 at 819:

> "This and similar efforts to pierce the clear and unequivocal allegations of a claim or cause of action in a libel or complaint, and characterize the claim or cause of action as one for wrongful withholding of moneys by the United States can only result in confusion and injustice. Rules of practice and procedure

relating to defenses, counterclaims and other matters are formulated for the purpose of simplifying the administration of justice and making it more expeditious, more certain and more effective. These rules cannot accomplish their purpose if pleadings clear on their face are construed to mean something quite different from what is plainly alleged therein."

FOURTH POINT.

THE DISTRICT COURT'S ALLOWANCE OF INTEREST ON THE WHOLE AMOUNT OF THE FINAL DECREE CONFORMED TO THE PRINCIPLES AND PRACTICE APPLYING IN ADMIRALTY SUITS BETWEEN PRIVATE PARTIES AND WAS ALSO EXPRESSLY AUTHORIZED BY THE SUITS IN ADMIRALTY ACT.

The third point of the brief for the United States (pp. 30-32) contends that the District Court erred in awarding interest at 4% upon the whole amount of the final decree. (R. 21) Petitioner claims that this caused a "compounding of interest" to the extent that, interest will run, until the decree is satisfied, on that portion [i.e.—$2,070.51] of the total recovery which represented interest at 4% on respondent's principal claim of $115,203.76, from the date when the libel was filed to the date of the decree.

Sec. 3 of the Suits in Admiralty Act (46 U. S. C. 743, quoted *supra*, pp. 2-3), expressly provides that where a decree against the United States is for a "money judgment", it "may include * * * interest at the rate of 4 per centum per annum until satisfied".

The words "until satisfied" and "money judgment" make it quite clear that Congress authorized the allowance of interest upon the amount of the *decree* as distinguished from the amount of the claim only. Any possible doubt on the point is removed by the further provisions of Section 3 of the Act that "interest shall run as ordered by the Court"

and that suits under the Act shall be "determined according to the principles of law and the rules of practice obtaining in like cases between private parties".

In admiralty suits between private parties, the allowance of interest is discretionary, but it is ordinarily allowed upon the full amount of the final decree, including interest. *The Blenheim*, 1883, C. C. Mass., 18 F. 47; *The Umbria*, 1892, C. C. A. 2d, 59 F. 475.

An illustration of the usual form of final decrees for "money judgments" in admiralty appears in Benedict on Admiralty, Sixth Edition, Vol. III, p. 146, form No. 335, which contains the following provision:

> "ORDERED, ADJUDGED AND DECREED, that the libelant recover of and from the respondent herein the sum of $500.00, with interest thereon, from * * * amounting to $....., together with the libelant's costs taxed in the sum of $..... and amounting in all to the sum of $..... with interest thereon until paid * * *."

The right of a libelant to interest upon the whole amount of a decree against the United States under the Suits in Admiralty Act was expressly upheld by the Circuit Court of Appeals, Third Circuit in *National Bulk Carriers* v. *United States*, 1948, 169 F. (2d) 943 at 951.

Petitioner's brief (p. 32, n. 22) purports to distinguish the *National Bulk Carriers* case, but its statement of the case is incorrect. Petitioner's statement suggests that the Court awarded interest "as an element of just compensation" for which "specific statutory authority * * * is not deemed required". In fact the *National Bulk* case was a suit brought under the Suits in Admiralty Act by a shipowner claiming for a total loss upon a policy of war risk insurance issued by the United States. It is true that the policy provided for payment of "just compensation" in

case of loss of the insured vessel but the suit did not involve a claim under the Fifth Amendment for just compensation.

In respect of interest, the case presented two questions but the only one which is material here did not concern "just compensation". The decree of the District Court had allowed interest on the whole amount of the decree and the government contended, as it does here, that "this results in compound interest." The Court overruled the government's contention and affirmed the decree. Speaking through McLaughlin, C. J., the Court said on this point (p. 951):

> "The valuation interest is palpably a part of the main award and so intended. It is proper in theory and in practice. 'Interest in such a case is allowed as well as costs; and in case of appeal, the interest is cast upon the whole amount of the decree in the court below; including the costs as well as the amount of the damage'. The Wanata, 95 U. S. 600, 613, 34 L. Ed."

The other interest question was whether the recovery for the loss should include interest at 4% from the date of the loss or from the date when the libel was filed. The court held that the provisions of Section 5 of the Suits in Admiralty Act precluded allowance of interest prior to the time when the libel was filed. The court declined to accept the owner's contention that the government's contractual undertaking to pay "just compensation" carried with it the obligation to pay interest from the time the cause of action arose. (169 F. 2d 951). In support of this conclusion, the Court cited *United States* v. *Thayer—West Point Hotel Company*, 329 U. S. 585, 590.

The foregoing considerations are more than sufficient to meet the government's objection, whether or not the decree could properly be said to allow "compound interest." In fact, there was no such allowance. The decree merely allowed

simple interest upon a fixed sum which was the entire amount of the decree. The various component sums which entered into the computation of the total sum, no longer existed as separate claims because they were all merged into a single judgment debt. *Morley* v. *Lake Shore R. Company*, 146 U. S. 162, 168. As the whole amount of the decree was due and payable when it was entered, there is no reason whatever why interest should not run on the whole amount until the decree is satisfied.

None of the cases cited in petitioner's brief (pp. 31-32) involves a decree under the Suits in Admiralty Act. Most of them are based upon the obsolescent doctrine of sovereign immunity which has no application whatever to this suit because of the express requirement of the Act that this suit shall be "determined according to the principles of law and the rules of practice obtaining in like cases between private parties".

LAST POINT.

THE OPINIONS BELOW WERE CORRECT AND THE FINAL DECREE OF THE DISTRICT COURT SHOULD, THEREFORE, BE AFFIRMED WITH COSTS.

January, 1959

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